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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

Nos. 722 and 723

JOHN W. FRANK, ET AL.,

Petitioners,

vs.

WILSON & CO., INC.,

Respondent.

WILSON & CO., INC. BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR THE SEVENTH CIRCUIT.

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May 9, 1949.

THE DARTNELL-WARREN PRINTING COMPANY, 630 WEST JACKSON, CHICAGO

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, WILSON & CO., INC., defendant below, files this, its brief in opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit filed by the petitioners, JOHN W. FRANK, *et al.*, plaintiffs below, predicated on the grounds that the petitioners have not stated reasons upon which a Writ of Certiorari could be granted under Rule 38(5) of the Rules of the Supreme Court of the United States.

Respondent is limiting its brief to the points raised in the petition herein and will not treat other points cov-

ered in the decision rendered by the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, dated February 10, 1949, is found in the Transcript of the Record at pages 553-559 and is reported in 172 Fed. (2d) 712. The District Court did not file a formal opinion, but did make an oral finding (T. pp. 428-429) and entered Findings of Fact (T. pp. 517-521) and Conclusions of Law (T. pp. 522-526).

JURISDICTION OF THIS COURT.

Petitioners seek to invoke the jurisdiction of this Court under Section 1254 of the Judicial Code.

A STATEMENT OF THE CASE.

This action was originally brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, to recover alleged unpaid overtime compensation under Section 16(b) of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. Sec. 200, *et seq.*) covering the period from July 15, 1941 to July 19, 1945. Judgment was entered in the Trial Court in favor of 149 plaintiffs in the sum of $14,211.62, plus interest and costs, and $1,500.00 attorney's fee. The amounts awarded ranged from $5.05 to Harry J. Schumacher to $168.53 for Alvin Arzig; thirty-three plaintiffs were awarded less than $50.00 each; sixty-nine less than $100.00 each (T. pp. 527-530). Defendant appealed from the judgment entered (T. pp. 553-554).

The Trial Court refused to award liquidated damages, concluding that the defendant's failure to compensate the plaintiffs in accordance with the Fair Labor Standards Act was in good faith and that the defendant had reasonable grounds for believing its acts were not a violation of the Fair Labor Standards Act. Plaintiffs cross-appealed from such determination (T. p. 554).

The defendant company was engaged in the meat packing business. Its plant in Chicago, Illinois, covered an area of four city blocks. It purchased livestock in various parts of the United States for shipment to its Chicago plant. The meat products and by-products produced at Chicago were shipped by defendant throughout the United States. A total of four thousand persons were employed at the Chicago Plant, which included 276 employed in the mechanical division, whose duties were to maintain and repair buildings, machinery and equipment

at the plant. It should be noted that only 38 of the 149 employees involved in this suit testified at the trial. The personnel in this division were blacksmiths, carpenters, tinsmiths, electricians, painters, millwrights, steamfitters, elevator repair men, and others in like vocations. The shops comprising the mechanical division were grouped together within a space of 900 feet. Each of the 149 plaintiffs herein was employed in the mechanical division. Most of them spent a large portion of their time working outside of their assigned shops (T. p. 554).

The time involved herein is a five minute period from 7:55 A. M. to 8:00 A. M., when the plaintiffs reported to their respective shops, received instructions if necessary, obtained or removed their tools from tool chests and cabinets, and, when working away from their shop, left their shops carrying their tools or supplies to go where their work was assigned in other parts of the plant (T. pp. 554-555). This amount of time was set by stipulation of counsel prior to trial (T. pp. 430-432). Periods to time less than five minutes were omitted by agreement. These preliminary activities were held to be compensable by the Trial Court but the Court of Appeals held that they were *de minimis* under the doctrine of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (T. p. 559).

The Court of Appeals did not consider it necessary to consider certain issues raised in the appeal from the District Court, among which was the question of denial of liquidated damages which was raised on the plaintiffs' cross-appeal (T. p. 559).

STATUTES INVOLVED.

The statutes involved herein are Section 7 of the Fair Labor Standards Act, 52 Stat. 1063, 29 U. S. C. § 207, which requires a payment of time and one-half for all hours worked over the statutory workweek; Section 16(b) of that Act, 52 Stat. 1069, 29 U. S. C. § 216(b), which gives employees a cause of action for unpaid minimum wages and overtime payments.

Section 11 of the Portal-to-Portal Act of 1947, 61 Stat. 89, 29 U. S. C. § 261, which permits a court to withhold liquidated damages, or to award a lesser amount than that of the unpaid wages where the employer shows, to the satisfaction of the Court, that he acted in good faith and had reasonable grounds for believing he was not violating the Fair Labor Standards Act; Section 2(a) of the Portal-to-Portal Act of 1947, 61 Stat. 85, 29 U. S. C. § 252(a) which relieves employers from liability under the Fair Labor Standards Act unless the activity was compensable by the express provisions of a contract, or by custom or practice; and Section 2(c) of the Portal-to-Portal Act of 1947, 61 Stat. 85, 29 U. S. C. § 252(c) which sets forth standards for determining the amount of compensable time are not involved in this proceeding since the issue has not heretofore been raised in a lower court, or a lower court has not considered the issue.

SUMMARY OF ARGUMENT.

The petitioners have failed to set forth proper and sufficient grounds upon which the Supreme Court could issue a Writ of Certiorari under Rule 38(5) of the Rules of the Supreme Court. The Court of Appeals has not decided any question of federal law which has not been settled by this Court previously in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680; nor is the decision of the Circuit Court of Appeals for the Seventh Circuit in conflict with any decision of the Supreme Court.

The *de minimis* maxim is not limited by fixed and certain periods of time regularly and consistently worked. The maxim applies to insubstantial and insignificant periods of time spent in industrial activities. It is only when an employee is required to give up a *substantial* measure of his time and effort that compensable working time is involved. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 692.

The *de minimis* maxim was properly applied in this case by the Circuit Court of Appeals, and its application was consistent with the policy of the Fair Labor Standards Act. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 692. The question of *de minimis* is applied very liberally in working time computation in the industrial world. Rigidity of rules, wherever applicable, is purely for disciplinary purposes.

Petitioners seek to raise *for the first time*, a question of law concerning the applicability of Section 2(c) of the Portal-to-Portal Act of 1947. This issue was not presented to the District Court nor to the Court of Appeals. Petitioners cannot now raise this issue. Even treating the applicability of Section 2(c) of the Portal-to-Portal Act

of 1947 on its merits, it does not remove the applicability of the *de minimis* doctrine. Congress did not intend that Section 2(c) should or would change the computation of the statutory workweek, especially when it would make such computation more restrictive on employers than it was prior to the passage of the Portal-to-Portal Act of 1947.

Finally, petitioners seek to have this Court decide the question as to whether or not liquidated damages should be granted the plaintiffs. The District Court judge, using his sound judicial discretion, refused to grant liquidated damages to the plaintiffs. The issue was brought before the United States Court of Appeals for the Seventh Circuit on cross-appeal by the plaintiffs, but the Court of Appeals did not decide the issue as it had resolved the main issue in favor of the defendant below (T. p. 559). Since petitioners must first overcome the decision of the Court of Appeals on the main issue, it cannot now request the Supreme Court to review any such issue not previously decided by the Court of Appeals.

ARGUMENT.

I.

Petitioners have failed to set forth grounds upon which the Supreme Court could issue a Writ of Certiorari.

The petitioners seek to invoke the discretionary power of this Court by petitioning for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit for two reasons:

First, petitioners allege that the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court. Respondent submits that any pertinent and proper questions raised in the petition in this case and which were treated by the Court of Appeals, were fully and completely treated by this Court in the decision rendered in the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and constituted an affirmation of the principles enunciated by this Court in that decision.

Secondly, the petitioners allege that the Court of Appeals has decided a federal question (the scope of the *de minimis* maxim) in a way "probably" in conflict with applicable decisions of this Court. Respondent submits that the Court of Appeals has followed very closely the decision of this Court issued in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, on the issues involved herein and is not in conflict with any other applicable decision of this Court. The Court of Appeals clearly bases its decision regarding *de minimis* upon this Court's decision in the *Mt. Clemens Pottery Co.*, case, *supra*, and follows the language therein (T. pp. 557-559). This subject is more fully treated in this brief under subdivisions II and III below.

II.

The de minimis maxim is not limited by fixed and certain periods of time regularly and consistently worked.

The second point advanced by the plaintiffs is that where an employee is regularly and consistently required to work, the *de minimis* maxim is inapplicable to fixed and regular periods of time. The plaintiffs' attempt to distinguish this case from the *Mt. Clemens* case. The only difference between the cases cited by the Court and the facts in this case is that here, by stipulation, to aid the Court, the parties eliminated the first step of determining the amount of time to be considered by the Court. By inference in the stipulation, the plaintiffs have admitted that anything under five minutes per day is *de minimis*, as such time was eliminated by *agreement*. The only matter involved in this Court's opinion in the *Mt. Clemens* case, was the question presented over again in this Petition for Rehearing, as to whether or not a maximum of five minutes per day came within the area of the doctrine of *de minimis non curat lex* as set forth in the *Mt. Clemens* case.

In the *Mt. Clemens* case the fixed period of time involved was a maximum of fourteen (14) minutes which included some principal activities as well as preparatory activities. (See 69 Fed. Supp. 710, 711.) In this case a maximum of five (5) minutes is involved primarily for preparatory activities. Nothing in the *Mt. Clemens* decision makes an express contract provision a condition precedent to the application of the *de minimis* doctrine. It applies whether there is an express, implied or no contract provisions, solely on the question as to whether or not a small amount of time is involved. The Supreme Court stated in the *Mt. Clemens* decision at page 692:

> "Work of that character (preliminary activities) must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or practice."

The Court then stated the doctrine of *de minimis* in defining the statutory "workweek" (328 U. S. 680, 693).

Clearly, the Court of Appeals herein had a mandate from the Supreme Court of the United States in its decision in the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and it is set forth in the language contained in the opinion of the Court of Appeals (T. pp. 553-559). In each of the cases set forth under Point II of the Petitioners' brief (pp. 15-18), the time involved was a regular and consistent requirement and the only remaining factor was the question as to whether or not the *de minimis* doctrine applied. As has been pointed out heretofore, the parties in this case reduced the lower court's burden and eliminated the necessity of the Court measuring the amount of time involved, by stipulating that nothing more than five minutes per day was involved nor nothing less than five minutes per day was to be considered by the Court.

Plaintiffs cite a new case in *Mabee* v. *White Plaines Publishing Company*, 327 U. S. 178, which involves a treatment of the *de minimis* doctrine by the Supreme Court in determining whether or not an individual company was engaged in interstate commerce. Surely this is of no value in a case involving an entirely different subject matter of preliminary activities under the Fair Labor Standards Act. In addition, this case was decided *before* the case of *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680, and as such, is of little moment in situations similar to the *Mt. Clemens* case. The recent decision in the Court of Appeals for the Sixth Circuit, *Hunter* v. *Madison Avenue Corp.*, No. 10720, April 22, 1949, the Court stated

> "Where some inconsequential incident of interstate commerce happens to result from the general conduct of a fundamentally intrastate business, the rule of *de minimis* is applicable and the Act does not apply."

This case explains the application of *de minimis* to the question of whether or not an enterprise is engaged in interstate commerce so as to come within the Fair Labor Standards Act.

As a matter of fact, there was no regularity or consistency to the time involved herein. The opinion of the Court of Appeals points this out (T. pp. 553-554) by showing the difference in the amounts of the award of judgment as between the separate plaintiffs ranging from $5.05 to $168.53 for a four year period, and further (T. pp. 554-555) by its description of the activities of plaintiffs during the five minute period. As is pointed out in the opinion, the activities varied as between plaintiffs and even as to individual plaintiffs from day to day (T. pp. 554, 556).

Over a four year period, using the plaintiffs' own figures the total amount due each plaintiff on the plaintiffs' theory, is approximately $100.00. This involves approximately 48 cents a week, or approximately less than 1 cent per hour on a straight time basis. The so-called "split second" absurdities that the plaintiffs talk about on page 23 of their brief, which appeared in the *Mt. Clemens* case, totalled fourteen minutes per day, which is nearly three times the amount involved herein, yet, those fourteen minutes were considered to be non-compensable and within the *de minimis* doctrine by the Court in the *Mt. Clemens* case.

The plaintiffs herein performed the same type of preparatory activities as were considered by this Court in the case of *Anderson* v. *Mt. Clemens Pottery Co., supra.* The Court of Appeals so found (T. pp. 558-559) and cor-

rectly reached the conclusion that all such time was within the *de minimis* rule set forth by this Court in the *Mt. Clemens* case. In the *Mt. Clemens* case fourteen (14) minutes were involved. Here only five minutes are involved. No real question can be raised as to the applicability of the *de minimis* rule in this case. Even the Trial Court had some reservations concerning this question (T. pp. 41-42, 121, 124, 134-135, 429).

Petitioners seek to distinguish other cases cited in the opinion of the Court of Appeals from the present case. They point out that each of these cases (Brief pp. 16-17) involve preliminary activities of an uncertain amount of time. The regularity and consistency is in each of these cases to an equal extent that it is present in the instant case. The amount of time involved is the only uncertainty in the cases. In the case now before the Court, this uncertainty was eliminated by a stipulation of counsel, thereby easing the burden of the Trial Court in determining the amount of time involved.

The petitioners have failed to show any error or grounds as to why this Court should grant a Writ of Certiorari to the Court of Appeals.

III.

The de minimis maxim was properly applied by the Court of Appeals, and is consistent with the policy of the Fair Labor Standards Act.

The Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor from the inception of the Act, has consistently interpreted the Fair Labor Standards Act as requiring that an employee be treated as being at work "for all time he is required to be on duty or on his employer's premises or to be at a prescribed work-place, and for all time reasonably to be de-

scribed as '*all* in a day's work'." (See Part 516.4 Record Keeping Regulations, issued October 21, 1938, 3 W. H. R. 31 at 32 and Interpretation Bulletin No. 13, 1944-45 W. H. Man. 172.)

The Supreme Court in determining compensable work time for purposes of the Act, has adopted three broad criteria, or indicia, of work: (1) Physical or mental exertion (whether burdensome or not; (2) exertion controlled or required by the employer; (3) exertion pursued necessarily and primarily for the benefit of the employer and his business. *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680. Thus the concept of worktime developed by the Administrator is consistent with that stated by the Supreme Court. At the same time, however, the Administrator has also recognized that *all* "worktime" is not necessarily compensable, and in the enforcement of the law, has, in effect, applied the doctrine of "*de minimis.*"

The Administrator has recognized that before compensation must be paid for non-productive worktime, such time must be "considerable." See paragraph 3, Interpretative Bulletin, *supra*, where the Administrator stated:

> "If the employer requires the employees to punch a time clock and the employee is required to be present for a *considerable* period of time before doing so, such time will be considered hours worked." (Emphasis ours.)

Accordingly, the Wage and Hour Division has approved employer practices in a relatively large plant of computing hours worked and wages from the start to finish of a productive work shift even though employees affected checked in or out fifteen to twenty-five minutes before and after the start or finish of each shift. 1944-45 W. H. Man. 234.

In the administration of the Walsh-Healey Act, 41 U. S. C. 35 *et seq.*, the Administrator has followed similar prac-

tices. For example, in response to an inquiry as to whether an employee must be treated as "at work" under the Walsh-Healey Act when walking between the time clock and his working place, the Administrator stated:

> "* * * the Department will not question any reasonable time allowance to permit any employee to go from the timekeeping office to his place of work. The period of from five to ten minutes, as referred to in your letter, would not be regarded as working time under the Act." 1944-45 W. H. Man. 1193.

Replying to another inquiry on compensable worktime, he ruled:

> "* * * As to recorded time, the Department makes allowance for a reasonable period of time to cover the period between the time an employee ceases work and the time he punches out on his card. However, a period in excess of fifteen minutes is regarded as unreasonable." 5 W. H. R. 148.

Thus, thus, the Administrator of the Wage and Hour and Public Contracts Division speaks of "considerable" time spent in preliminary activity before such periods will be considered to be compensable worktime. In addition, the Administrator takes cognizance of agreement, as well as established custom and usage in determining what may be "considerable," to avoid rigidity and inflexibility in the administration of these related statutes.

With reference to "travel time" the Administrator has recognized that the realities preclude adoption of a precise formula for application in every case. In Interpretative Bulletin No. 13, paragraph 9, he states:

> "The problem of travel time, in relation to hours worked, arises in a great variety of situations and no precise mathematical formula will provide the answer in every case. The question is often one of degree; * * *."

Moreover, in instances where an employee is directed to report to work at some place other than the employer's place of business, the Administrator has ruled that working time begins "at the time he reports for work unless the traveling time required in order to reach the place * * * is unreasonably disproportionate to the normal traveling time required in reporting for work at the headquarters of the employer." Interpretative Bulletin No. 13, paragraph 12. What is "unreasonably disproportionate" is a question of fact in each case and reasonable standards agreed upon by the parties will be acceptable for purposes of the Act. The Administrator has stated:

> "What is unreasonably disproportionate depends upon the facts in the particular case and reasonable standards agreed upon between the employer and employee will be accepted for purposes of the Act." *Idem*

Again, with reference to employees who are required to travel continuously and perform labor while traveling, the Administrator has said:

> "No precise formula will decide this type of case and any reasonable agreement entered into between the parties or established by *custom and usage* * * * will be respected by this Division in its enforcement policy." Interpretative Bulletin No. 13, paragraph 14.

In view of the last quoted excerpt from Interpretative Bulletin No. 13, it cannot be doubted that the Administrator attaches great weight to custom and usage in applying the doctrine of *"de minimis."* In addition, he has stated in paragraph 2 of the same Bulletin that "the Act contains no express guide as to the manner of computing hours of work and reasonable rules must be adopted for purposes of enforcement of the wage and hour standards."

Thus, it is obvious that the Administrator has developed a practical rule for applying *"de minimis"* to preliminary

worktime before and after shifts. (It is our understanding that in inspecting for compliance with the Wage-Hour Act inspection officers are instructed to disregard as working time any period up to fifteen minutes at the beginning and end of each shift.) Such time to be compensable must be "considerable" as determined in relation to what is "reasonable" in light of all the facts of a particular situation. This administrative rule as to *"de minimis"* obviously has taken into consideration the important factor of established custom and usage and the human give and take on both sides of the employment relationship. (See Interpretative Bulletin, No. 13, paragraph 14, *supra.*)

It is well settled that the practical administrative interpretation of an ambiguous or uncertain statute by the executive department charged with its administration or enforcement is entitled to the highest respect and though not controlling will not be disturbed except for very cogent and persuasive reasons. (See the many cases cited in the annotations in 84 L. ed. 28, and 73 L. ed. 322, *et seq.*) As stated by the Supreme Court, the administrative interpretations of the Wage-Hour Administrator "while not controlling on the courts, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance." *Skidmore* v. *Swift and Company,* 323 U. S. 134, 89 L. ed. 124, 65 S. Ct. 161. In other words, the rulings, interpretations and opinions of the Wage-Hour Administrator are to be accorded great respect by the courts. These administrative rulings, interpretations and opinions are particularly relevant to any judicial application of the *"de minimis"* doctrine since they recognize the realities of the industrial world and have been applied according to the practicalities of industrial operations in the light of custom and usage.

Employers generally have resorted to and relied upon interpretations and policies of the Wage and Hour Ad-

ministrator, and it was held by the Supreme Court to be entirely proper. (*Skidmore* v. *Swift & Co.*, 65 S. Ct. 161.) Indeed, had they not done so the Administrator would no doubt have compelled such observance. It is submitted, therefore, that no court should penalize parties for having relied upon administrative interpretations and policies except in cases where such administrative interpretations or policies are clearly erroneous under the statute involved. Obviously, such is not the case here with respect to the administrative application of *"de minimis."*

While the courts generally have not yet had occasion to apply the *"de minimis"* doctrine to worktime questions, District Judge Kirkpatrick has recognized that what is compensable worktime is to be tested by the standard of reasonableness. In applying *"de minimis"* to a case before him, Judge Kirkpatrick stated:

> "The true test is whether the employee was unreasonably deprived of time which he should have had free." *Cameron* v. *Bendix Aviation Corp.* (D. C. E. Pa. 1946), 65 Fed. Supp. 510.

In effect, therefore, Judge Kirkpatrick adopted the Administrator's policy as a guide in applying the *de minimis* doctrine to the facts before him.

It is not contended here that the administrative practices must be blindly adhered to in applying the *de minimis* doctrine to every case. It is contended, however, that the basic test of what is reasonable in view of all the circumstances of a case is the only true test as to how the *de minimis* doctrine is to be applied.

Since the Administrator has definite enforcement responsibilities under the statute, it must be recognized that he has applied his rule on *de minimis* in a fashion not detrimental to employees. It follows, therefore, that his rules, as applied, indicate that the very shortest of periods of worktime may be disregarded under the doctrine

of *de minimis*. That this is so was recognized by Judge Kirkpatrick in the *Bendix* case, 65 Fed. Supp. 510, when he said:

> "To interpret the Act any more strictly than the Administrator himself has done, it seems to me, would lead to the elimination of all reasonable human give and take adjustments on both sides and would probably be more detrimental in the long run to the interests of the employees than to those of the employer."

The Supreme Court in the *Mt. Clemens* case made it clear that the "workweek contemplated by Section 7(a) must be computed in light of the realities of the industrial world" (328 U. S. 680; 692). It also made clear that the determination of what constitutes compensable time within the statutory workweek must be made with full effect given the doctrine of *de minimis*. The Court stated at p. 692:

> "It is only when an employee is required to give up a *substantial* measure of his time and effort that compensable working time is involved." (Emphasis ours.)

What is "substantial" must, of course, be judged upon the basis of what is reasonable in the light of all the factors present in a particular situation.

Thus, the Court, by making a "substantial" amount of preliminary time the criterion for compensation, has apparently subscribed to the test of reasonableness formulated by the Administrator and applied by Judge Kirkpatrick in the *Bendix* case.

Granting that the Supreme Court decision in *Jewel Ridge Coal Corporation* v. *Local 6167 UMWA*, 325 U. S. 161, 89 L. ed. 1534, 65 S. Ct. 1063, seems to preclude custom or contract as bearing on the determination of the overall statutory workweek, it does not follow that established custom and usage is not to be considered as a guide in disregarding non-productive worktime under the *de minimis* doctrine. On the contrary, the Supreme Court did

contemplate that custom and usage be considered as a factor in applying *de minimus,* since custom and usage obviously are part of the industrial realities under which compensable worktime must be determined. Therefore, *de minimis* must be applied in the light of what is "substantial" and "reasonable" in view of all the factors present in each case, including custom and usage.

The Supreme Court said in *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680, that the activities in that case compelled the employees to spend an estimated 2 to 12 minutes daily, if not more, in walking on the premises and in referring to these activities, instructed the lower court to examine them in light of the realities of the industrial world and to apply the rule of *"de minimis non curat lex."* The Court inferred that a matter of 12 minutes, or more, would be *de minimis.* In the case before this Court a maxim of five (5) minutes is involved in some cases and less in others.

On remand, Judge Picard, in the United States District Court for the Eastern District of Michigan, 69 Fed. Sup. 710, after determining that the maximum amount of time spent in the activities of walking, changing clothes, greasing arms, putting on finger cots or gloves, preparing new equipment, turning on light and machine switches, scraping locks, etc., required a maximum, in any department of 9.6 minutes per day. He held in his opinion at page 719:

> "We hold, therefore, that excepting for the purpose of this decision, the theory that the Supreme Court set at least 12 minutes of walking time daily as not being *de minimis,* it did so with one, if not two, restrictions to be used in computing what these 12 minutes should cover:
>
> "(A) That it is only the walking time to and not from the work bench; or
>
> "(B) In no event can we consider walking time involved in going to and from lunch for one's own

'convenience and necessity', and which is not 'necessarily and primarily for the benefit of the employer and his business.'

"The maximum walking time under such yardstick that can be reckoned in favor of any Plaintiff in this case is 6.2 minutes daily (Mould Department).

"If, on the other hand, the Supreme Court did not intend to even intimate or indicate what it thought was *de minimis* in walking time, it is our opinion, and we hold that we would not go lower than 12 minutes as above restricted (the minority opinion indicates that 10 minutes would surely be *de minimis*) and without setting any *de minimis* figure herein, hold all the walking and preliminary activities time consumed in this case is *de minimis.*"

Since Judge Picard has made his second decision in the case of *Anderson* v. *Mt. Clemens Pottery Company,* 69 Fed. Sup. 710, other courts have treated this question. In the case of *Timmons* v. *Wagoner County Coal Company,* (U.S.D.C. Eastern District of Oklahoma) 7-10-47, 13 Lab. Cas. § 64,696, Judge Broaddus stated:

"When the time required of an employee in reaching the points where such employee begins his services, as entering upon the premises of the employer, is trivial and only a few minutes in duration, no extra compensation for such time is due to the employee." *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680, 692; Retrial D. C. E. D. Mich. 69 Fed. Sup. 710.

The judge then determined that the amount of time involved in this case was three minutes going to work and three minutes returning from work, all of which was subject to the "*de minimis*" rule.

On July 17, 1947, in the case of *McIntyre* v. *Seagram & Sons Company,* U. S. D. C., W. D. Ky., 72 Fed. Sup. 366, Judge Shelbourne, of that Court, held as follows, at page 372:

"The evidence in this case conclusively shows that

> the plaintiff, proceeding with reasonable dispatch, could, after punching in on the time clock, proceed to his locker, change a soiled for a clean uniform, change his clothing and report to his foreman ready for productive work in from ten to twenty minutes. Such time is within the *'de minimis'* rule." *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680; 68 Fed. Sup. 710.

On September 26, 1947, in *Adkins* v. *E. I. DuPont de Nemours Company, Inc.,* Civil No. 1816, 13 Lab. Cas. 64,025, the United States District Court for the Northern District of Oklahoma, upheld the constitutionality of the Portal-to-Portal Act of 1947 and dismissed the action for lack of jurisdiction. This was a suit brought under the provisions of the Fair Labor Standards Act and involved so-called "Portal-to-Portal" claims based on "travel" and "make ready" activities.

The special master in the *Adkins* case had concluded, among other things, that the time spent by plaintiffs in such activities, ranging from eight minutes to twenty-one or twenty-two minutes per day, was subject to the *de minimis* doctrine by the Supreme Court in *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680, and, therefore, was not compensable. The court, however, concluded that since it lacked jurisdiction, it could not properly consider unrelated issues.

On July 28, 1948, Judge O'Connor for the U. S. District Court, Southern District of California, in the case of *Tully* v. *Joshua Hendy Corp.,* 15 Lab. Cases § 64,696, stated:

> "The Court in this instant case heretofore stated that if the plaintiffs had any evidence to show that they were directed to work during the noon hour and did perform services (substantial services) in accordance with the terms and provisions of the contract; they were entitled to be paid therefor, but that they would be bound by the terms of the contract; and,

> while the evidence does show that some services were performed during the lunch period, the men were in much the same position as those in the case decided by Judge Yankwich (*Devine, et al.* v. *Joshua Hendy Corp.*, 14 Lab. Cases § 64,496), and used their lunch period in much the same way. The Court concludes, therefore, in accordance with the Portal-to-Portal Act, that these services are not compensable and would also come under the *de minimis non curat lex* rule."

Clearly then, the five minutes or less time per day involved in this case, is subject to the doctrine of "*de minimis non curat lex.*" As has been pointed out above, the Supreme Court has indicated that twelve minutes would be *de minimis*. District Courts have stated that as high as twenty to twenty-two minutes would be *de minimis*. Certainly the amount of five minutes per day, or less involved in this case, comes well within the requirements set down by the Supreme Court in making insubstantial amounts of time subject to the *de minimis* rule.

Petitioners attempt to show that industry does not regard a five minute period as *de minimis*. In support of this theory petitioners cite certain studies of clauses in collective bargaining agreements. We are not here concerned with what has been worked out by certain companies in contracts with their employees.

The Supreme Court has fully treated this matter and reached its conclusions in the following language appearing in the *Mt. Clemens* case at page 692:

> "We do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible. The workweek contemplated by § 7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the pol-

icy of the Fair Labor Standards Act. It is only when an employee is required to give up a *substantial* measure of his time and effort that compensable working time is involved. The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue." (Emphasis ours.)

This finding and conclusion by this Court is, of course, final and applicable to this case.

The defendant placed into the record copies of its contracts between the collective bargaining agent for the employees in question and the Company, which show that these employees have received payment for "fringe" items, such as twelve (12) minutes per day time for changing clothes, fifty (50) cents per week allowance for work clothing, furnishing of tools and equipment, pay for time for preparation of knives, furnishing meat hooks, safety equipment, second meal and time to eat same, eight paid holidays, guaranteed thirty-six (36) hour week, sick benefit plan, etc. (Deft. Exhibits 9 and 10, T. pp. 493-497). Unless there is some limitation placed on such "fringe" items such as applying the *de minimis* doctrine, under proper circumstances, an employer would never know what his labor costs were.

There is no basis for the plaintiffs' pure assumption that the defendant will revert back to an alleged practice, which admittedly ceased three and one-half years ago. Defendant has no such intent nor is there any basis for plaintiffs making any such assumption. This practice was stopped in July of 1945, almost a year before the Supreme Court decision in the *Mt. Clemens* case.

Although he did not join in the original appeal, the Solicitor for the United States Department of Labor was granted leave to file a brief as *amicus curiae* supporting

the Petition for Rehearing just prior to the date defendant's answer to said petition was due. The plaintiffs' attorney was formerly Regional Wage and Hour attorney at Chicago. The Court of Appeals, nevertheless, denied the Petition for Rehearing.

IV.

Petitioners now seek to raise issues in this court not heretofore raised in any court below, or not decided in the lower courts.

A.

The interpretation and application of Section 2(c) of the Portal Act has not been raised heretofore by the petitioners.

Petitioners show as one of the statutes involved in this case, Section 2(c) of the Portal-to-Portal Act of 1947 which reads as follows:

> "(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section."

(Petition for Writ of Certiorari, p. 6; Specification of Errors, Brief p. 11; Argument, Brief pp. 12-15.) This issue is entirely foreign to any issue previously raised by the petitioners in any pleadings or briefs below. The point was not raised in the District Court, it was not raised in the appeal to the Court of Appeals, nor in petitioners' petition for rehearing in said Court. Now, for the first time, petitioners seek to gain review of the decision of the Court of Appeals partially on this ground.

This Court has held that, on certiorari, the Supreme Court will not decide questions not dealt with by the Circuit Court of Appeals (*Owens* v. *Union Pac. R. Co.*, (1943) 63 S. Ct. 1271, 319 U. S. 715; *Burnet* v. *Commonwealth Improvement*, (1923) 53 S. Ct. 198, 287 U. S. 415; *Waterloo Distilling Corp.* v. *U. S.*, (1931) 51 S. Ct. 282, 282 U. S. 577; *Sonzinsky* v. *U. S.*, (1937), 57 S. Ct. 554, 300 U. S. 506).

Since this issue has not heretofore been dealt with nor considered below, the Supreme Court should not now take it into consideration.

However, to treat the issue briefly on its merits, the section above quoted must be considered in the light of the intent of the Portal-to-Portal Act. The Act is entitled "An act to *relieve employers* from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes." This being the purpose of the Act as a whole, it cannot be construed to place additional liabilities or punishments upon employers not previously placed upon them by the Fair Labor Standards Act of 1938 and its interpretations. The main purpose of the Portal Act is to *relieve employers* from certain liabilities and punishments, not to add new liabilities by changing the interpretation of the language of the Fair Labor Standards Act.

This being the case, the rulings of the Courts which interpret the Fair Labor Standards Act, still control unless specifically changed by the Portal-to-Portal Act. The definition of the workweek set forth by this Court in the *Mt. Clemens* case at page 692 is still controlling. This definition set forth the *de minimis* rule. The definition has been applied to the instant case and is entirely correct and in compliance with applicable decisions of the Supreme Court. Unless there is a substantial amount of time in-

volved, there is no time involved at all within the meaning of "Workweek" as contemplated in Section 7(a) of the Fair Labor Standards Act.

Nor does the language of Section 2(c) of the Portal Act forbid the application of the *de minimis* maxim to periods of time, however short, which are compensable by express contract. The maxim "*de minimis non curat lex*" is not limited by express contracts. The maxim has been applied in common law to all kinds of contracts, whether express or implied. Unless language of legislation specifically annuls a common law doctrine, such doctrine is not affected. Here the intent of Congress was not to create additional liabilities upon employers, but to relieve such employers of certain burdensome liabilities and penalties which arose from the previous interpretations of the Fair Labor Standards Act.

Congressional intent of this is evidenced by the following excerpts from the legislative history of the Portal-to-Portal Act of 1947:

> "Section 3 of the bill is a saving provision which affirmatively provides that section 2 will not release or extinguish any penalty or liability incurred under the Fair Labor Standards Act, the Walsh-Healey Act, or the Bacon-Davis Act prior to the date of enactment of the bill which is based upon activities other than portal-to-portal activities. This section does not change in any manner the status of any claim." (Senate Judiciary Committee's Report on H. R. 2157.)

Thereafter in the statement accompanying the Conference Report on H. R. 2157, the following appears at page 2:

> "The Senate amendment (section 3) provided that the provisions of section 2 of the Senate amendment which made past activities not compensable if not compensable under the contract, custom, or practice, should not be deemed to remove penalty or liability

under the afore-mentioned three Acts based on activities other than the ones so declared not to be compensable. This provision is omitted under the conference agreement as surplusage, and as fully covered by the provisions of section 2(c) of the bill as agreed to in conference, described above under this heading."

In explaining the Conference Report on the floor of the House (Congressional Record—House—5-1-47, p. 4515) Representative Walter, a member of the Conference Committee stated:

"There are certain provisions of the report which I believe require further explanation and clarification. The first relates to section 2(c). As indicated in our statement, the purpose of section 2(c) is to prevent the construction of subsection (a) relieving employers from liability for minimum wages which they now have and to make it clear that time worked includes only that time spent in activities which are compensable under subsection (a). However, neither section 2(c) nor section 2(a) is intended to create additional overtime liability in cases where employers now make special payments or allowances for certain specified activities of their employees which are not included in time worked, according to the contract or custom or practice.

"I have in mind payments or allowances at straight time, or in stipulated amounts, for clothes changing or washing up, or other so-called fringe awards, directed or approved by the National War Labor Board."

These portions of the legislative history show very clearly that the only intent of Section 2(c) of the Portal Act was to make it clear that no relief was granted from existing claims that were not covered by Sections 2(a) and 2(b). The intent is further shown that these claims, not barred by Sections 2(a) and (b), would stand on their merits under the existing interpretations of working time under the Fair Labor Standards Act. As has been pointed

out previously herein, there must be a *substantial* amount of time involved or there can be no recovery. The definition of "workweek" under Section 7(a) of the Fair Labor Standards Act set forth in the *Mt. Clemens* decision, 328 U. S. 680, 692, applies to employment contracts whether written or unwritten, express or implied. No other construction can be placed on this definition.

In its brief (p. 15) petitioners admit that the time involved is small. The Court of Appeals so found and applied the law as set forth by this Court. The decision of the Court of Appeals is not in conflict with any applicable decision of this Court.

This Court should not take this point into consideration since it was not raised or dealt with in the courts below.

B.

The issue of liquidated damages was not determined by the Court of Appeals, and this Court should not decide questions not dealt with by the Court of Appeals.

In exercising its sound discretion, the Trial Court refused to grant liquidated damages to the petitioners. Petitioners filed a cross-appeal on this question with the Court of Appeals, but the Court of Appeals did not decide the issue as it decided the main issue for the defendant below (T. p. 559). Petitioners now seek to have this Court decide an issue not considered or dealt with below. As pointed out above in this brief, the Supreme Court will not determine, on certiorari, issues not considered below. (*Owens* v. *Union Pac. R. Co.*, (1943) 63 S. Ct. 1271, 319 U. S. 715; *Burnet* v. *Commonwealth Improvement*, (1932) 53 S. Ct. 198, 287 U. S. 415; *Waterloo Distilling Corp.* v. *U. S.*, (1931) 51 S. Ct. 282, 282 U. S. 577; *Sonzinsky* v. *U. S.*, (1937) 57 S. Ct. 554, 300 U. S. 506.) This issue should not be considered on the petition for writ of certiorari.

Notwithstanding the fact that the Supreme Court, under its rules of procedure will not consider issues not treated below, the issue raised by the petitioners is without merit. Courts that have treated this matter under Section 11 of the Portal-to-Portal Act have decided that the court may, in its discretion, refuse to grant liquidated damages even though the employer's approach may have been unsound but not unreasonable. (*Jackson* v. *Northwest Airlines,* 75 Fed. Supp. 32); or that the employer did not wilfully or make any attempt to evade the law or violate the Act (*Sawyer* v. *Bay State Motor Express Co.,* 14 Lab. Cas. 64,417); or if the employer relied upon an inspection of the Wage and Hour Division, regardless of whether or not such inspection was a correct legal interpretation of the Act (*Bauler* v. *Pressed Steel Car Co.,* 81 Fed. Supp. 172); or good faith reliance on any administrative action on any one of the scores of Government agencies and their administrative practices or enforcement policies, including the statements of inspectors or their passive actions relative to the method used by the employer. (*Burke* v. *Mesta Machine Co.,* 79 Fed. Supp. 588.)

The intent of Congress was to allow relief wherever the employer demonstrates to the Trial judge that he had no intent to evade the provisions of the Act (see Congressional Record for February 28, 1947, page 1621). Likewise where the court finds that the violation was not in *bad* faith, the court has discretion as to the imposition of liquidated damages under Section 11 of the Portal Act. (Congressional Record, May 1, 1947, page 4513.)

There is sufficient evidence in the record to support the Trial Court's finding of denial of liquidated damages. (See T. 386-389, 403, 447-452, 523.)

Conclusion.

The petitioners have failed to show grounds which would warrant this Court granting their Petition for Writ of Certiorari. The Petition should be denied.

Respectfully submitted,

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